

MEMORANDUM**State of Alaska****Department of Law**

TO: Glenn Haight
Executive Director
Alaska Board of Fisheries

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SUBJECT: Department of Law
comments on proposals
for the February 23-
March 8, 2017 Board of
Fisheries meeting for
Upper Cook Inlet finfish

The Department of Law has the following comments on the proposals to be considered by the Board of Fisheries at its February 23-March 8, 2017 meeting for Upper Cook Inlet finfish:

Proposals 86, 91, 94, 107, 118, 123, 128, 134, and 137: These proposals appear to assert that the board must amend one or more salmon management plans to be consistent with the Alaska Constitution, statutes, regulations, and/or the Magnuson-Stevens Fishery Conservation and Management Act. The Alaska Supreme Court has repeatedly made it clear that in carrying out its statutory duty to provide for the conservation and development of the fishery resources of the state, the board may regulate fisheries differently, allocate fishery resources among fisheries, and adopt a management plan that opens a mixed stock interceptor fishery only after another fishery is projected to achieve its escapement goal. In 2012, the National Marine Fisheries Service (“NMFS”) agreed that the State’s salmon fishery management is consistent with the Magnuson-Stevens Act’s National Standards. NMFS further found that the State’s sustained yield principle is equivalent to the Magnuson-Stevens Act’s concept of optimum yield.

Proposals 99, 121, and 210: Each of these proposals asserts that the Alaska Supreme Court has ruled that once the fishing season starts, the department should ignore the board's management plans and manage fisheries to meet escapement goals. The authors may be referring to *Cook Inlet Fishermen's Fund v. ADFG*, 357 P.3d 789 (2015), in which the court affirmed a summary judgment that ADFG did not violate the board's Cook Inlet salmon management plans during the 2013 salmon fishing season. Although the department retains emergency order authority under AS 16.05.060(a) to open or close seasons or areas or change weekly closed periods when "circumstances require," it is not accurate to say that the department's emergency order authority allows the department to ignore the board's management plans.

Proposal 130: To the extent the proposal is suggesting that the board must adopt the proposal to be consistent with Alaska Supreme Court rulings in *Lieutenant Governor of State v. Alaska Fisheries Conservation Alliance, Inc.*, 363 P.3d 105 (Alaska 2015), and *Pullen v. Ulmer*, 923 P.2d 54 (Alaska 1996), that is not accurate. Those court decisions do not require that users share in resource conservation in proportion to their use.

Proposal 195: This proposal seeks to "remove the commissioner's emergency order authority to extend the Kenai River personal use fishery hours." While the board can adopt regulations establishing priorities for the department to adhere to in managing fisheries, the board cannot "remove" the commissioner's authority under AS 16.05.060(a) to open or close seasons or areas or change weekly closed periods when "circumstances require."

Proposal 205: Were the board to adopt this proposal, it should articulate the reason for allowing dipnetting from approved platforms on private land, but not other land (assuming a platform would be allowed to be constructed on non-private land).

Proposal 239: Given the board's expanded authority to adopt regulations establishing youth sport fisheries for residents under 18 years of age and non-residents under 16 years of age, were the board to adopt this proposal and establish a youth fishery limited to persons under 16 years of age, the board should articulate a fishery conservation and development reason for limiting participation in this youth fishery.